



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 10**  
1200 Sixth Avenue, Suite 900  
Seattle, Washington 98101-3140

**FEB 16 2010**

REGIONAL ADMINISTRATOR

The Honorable M. Brian Cladoosby  
Tribal Chairperson  
Swinomish Indian Tribal Community  
P.O. Box 817  
La Conner, Washington 98257

Dear Chairperson Cladoosby:

I am pleased to inform you that the U.S. Environmental Protection Agency (EPA) Region 10 has completed our review of the Swinomish Indian Tribal Community's application for "treatment in the same manner as a state (TAS)" for the purpose of being treated as an "affected state" under Section 505(a)(2) of the Clean Air Act (CAA), and to implement a Tribal Implementation Plan (TIP) to regulate open burning on the Swinomish Reservation under Section 110 of the CAA.

After review of the application and considering the comment received from the State of Washington, EPA has determined that the Swinomish Indian Tribal Community meets the requirements of CAA Section 301(d) and EPA regulations at 40 CFR Part 49 for the stated functions. Therefore the Swinomish Indian Tribal Community is eligible to be treated in the same manner as a state for purposes of implementing a TIP to regulate open burning on the Swinomish Reservation and commenting as an affected state.

We are pleased to make this positive determination. As the Swinomish Indian Tribal Community moves forward in implementing and operating programs for the prevention and control of air pollution, we look forward to continued collaboration for environmental protection. If you have any questions on this matter, please do not hesitate to contact me (206) 553-1234, or Justin A. Spenillo, State & Tribal Air Programs Unit, at (206) 553-6125.

Sincerely,

Michelle L. Pirzadeh  
Acting Regional Administrator

Enclosure: Eligibility Determination

cc: Mr. Charles O'Hara, Planning Director  
Swinomish Indian Tribal Community  
Mr. Ted Sturdevant, Director  
Washington Department of Ecology



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
1200 Sixth Avenue, Suite 900  
Seattle, Washington 98101-3140**

**ELIGIBILITY DETERMINATION FOR THE SWINOMISH INDIAN TRIBAL  
COMMUNITY  
FOR TREATMENT IN THE SAME MANNER AS A STATE  
UNDER THE CLEAN AIR ACT**

The Office of Regional Counsel (ORC) and the Office of Air, Waste and Toxics (OAWT) have reviewed the application, dated January 6, 2009, of the Swinomish Indian Tribal Community (SITC), for eligibility for treatment in the same manner as a state (TAS) for two purposes: (1) having "affected state" status under § 505(a)(2) of the Clean Air Act (CAA);<sup>1</sup> and (2) implementing a Tribal Implementation Plan (TIP) for open burning under CAA § 110. Based on that review and the analysis set forth below, ORC and OAWT conclude that application meets the requirements of 40 CFR § 49.7, and recommend that the Regional Administrator determine that SITC meets the requirements of CAA § 301(d) and 40 CFR § 49.6 and is therefore eligible to be treated in the same manner as a state for the two purposes specified above. This document addresses SITC's eligibility to implement a TIP. Review and approval or disapproval of any TIP that SITC proposes would be the subject of a separate notice and comment process.

**ELIGIBILITY REQUIREMENTS**

EPA published the Air Quality Planning and Management Rule for Indian Tribes (Tribal Authority Rule or TAR) on February 12, 1998. 63 Fed. Reg. 7,254 (February 12, 1998). The TAR at 40 CFR § 49.6 states:

Sections 301(d)(2) and 302(r), 42 U.S.C. §§ 7601(d)(2) and 7602(r), authorize the Administrator to treat an Indian Tribe in the same manner as a state for the CAA provisions identified in 40 CFR § 49.3 if the Indian Tribe meets the following criteria:

- (a) The applicant is an Indian Tribe recognized by the Secretary of the Interior;

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<sup>1</sup>The Clean Air Act (CAA) is codified at 42 U.S.C. §§ 7401-7671q.

(b) The Indian Tribe has a governing body carrying out substantial governmental duties and functions;

(c) The functions to be exercised by the Indian Tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the Tribe's jurisdiction; and

(d) The Indian Tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the CAA and all applicable regulations.

### **STATE AND PUBLIC REVIEW**

The TAR at § 49.9(b) provides that the Regional Administrator shall notify appropriate governmental entities of an Indian tribe's initial, complete application under the CAA. By a letter from the Regional Administrator to Governor Gregoire, dated February 12, 2009, EPA provided the State of Washington a copy of SITC's application, and offered the State an opportunity to submit comments on SITC's description of its Reservation boundaries within 30 days, as provided in the TAR at § 49.9(c). EPA also provided notice of the application in the Skagit Valley Herald and the Seattle Times, and invited local governments and the public to submit any comments they may have on the Reservation boundaries to EPA and the State of Washington.

In a letter dated March 20, 2009, the State of Washington submitted comments on the TAS application. The State did not dispute the Swinomish Reservation boundaries as described in the TAS application, and raised no objection to the TAS application. The State's comments also stated that the State had received no comments on the TAS application from other parties, such as local governments or members of the public. EPA received no other comments on the TAS application.

### **ELIGIBILITY REVIEW**

The following evaluation reviews whether SITC meets the TAS eligibility criteria for the purposes of CAA § 110 and 505(a)(2).

#### **1. Federal Recognition**

SITC is included on the list published by the Secretary of the Interior of Indian entities recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes. 74 Fed. Reg. 40,218, 40,221 (August 11, 2009).

The application meets the requirements of 40 C.F.R. § 49.7(a)(1), and SITC meets the requirement of 40 C.F.R. § 49.6(a).

## **2. Substantial Governmental Duties and Powers**

SITC is organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, through a Constitution and Bylaws originally ratified by members on November 16, 1935, and approved by the U.S. Secretary of the Interior on January 27, 1936. The Constitution and Bylaws were most recently amended and ratified by SITC on September 7, 1985, and approved by the U.S. Secretary of the Interior on October 22, 1985.

The Constitution authorizes the Swinomish Indian Senate to carry out the executive and legislative functions of the SITC government. Articles III and VI. The Senate consists of eleven members who serve staggered five year terms, and are elected by eligible SITC members. Article III Sec. 2, Article VI. The Senate has the authority to create and oversee subcommittees, and to appoint, employ, and manage staff to carry out executive governmental functions. Article III Sec. 3, Article VI Sec. 1(s).

SITC carries out a number of governmental functions related to health, education and welfare, including zoning and environmental protection, as described in the Application. These include pre-school, school, and college educational programs, social services, housing, corrections, medical services, utilities, fish and wildlife management, and taxation. A tribal court system exercises judicial powers, and consists of trial court (the Swinomish Tribal Court) and an appellate court (the Swinomish Court of Appeals). To carry out these functions, SITC employs more than one hundred individuals, including police officers, medical professionals, managers, scientists, and other personnel.

The TAS application demonstrates that SITC is an Indian tribe with a governing body carrying out substantial governmental duties and powers. The application meets the requirements of 40 C.F.R. § 49.7(a)(2), and SITC meets the requirement of 40 C.F.R. § 49.6(b).

## **3. The functions to be exercised by the Indian Tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within SITC's jurisdiction**

CAA § 301(d)(2)(B) and the TAR at § 49.6(c) require that the functions to be exercised by the applicant Indian tribe pertain to the management and protection of air resources "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." For reservations, CAA § 301(d)(2)(B) is a grant of statutory authority to eligible tribes to regulate all air resources within the boundaries of their reservations. See 63 Fed. Reg. 7254-57 (Feb. 12, 1998); *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000) (upholding the TAR), *cert. denied sub nom., Michigan v. EPA*, 532 U.S. 970 (2001). Thus, in applications where the tribe proposes to manage and protect air resources only within the boundaries of its reservation, the

primary focus of the inquiry into the tribe's authority to do so is the precise boundaries of the reservation. Accordingly, an applicant tribe must identify with clarity and precision the exterior boundaries of the reservation. 40 C.F.R. § 49.7(a)(3). Typically, a map or legal description of the area is sufficient. See *id.*; 59 Fed. Reg. 43,956, 43,962 (Aug. 25, 1994). In this application, SITC seeks TAS under CAA § 301(d) for purposes of CAA §§ 110 and 505(a)(2)<sup>1</sup> for all lands within the exterior boundaries of the Swinomish Indian Reservation.

The Swinomish Indian Reservation is located on Fidalgo Island, in Skagit County near LaConner, Washington, about 70 miles north of Seattle. SITC's application identifies the exterior boundaries of the Reservation lands within which it seeks to exercise functions pertaining to the management and protection of air resources. The application describes those boundaries exactly as they were described in the Findings of Fact that EPA made in its April, 2008, Decision Document approving SITC's application for TAS under Sections 303(c) and 401 of the Clean Water Act, as supported by the map SITC submitted. Neither the State of Washington, nor any members of the public, has disputed those boundaries in the public notice and comment process for this CAA TAS application. Thus, this Application appropriately identifies valid reservation boundaries within which SITC seeks to manage and protect air resources.

The application meets the requirements of 40 C.F.R. § 49.7(a)(3), and SITC meets the requirement of 40 C.F.R. § 49.6(c).

**4. The Indian Tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the CAA and all applicable regulations**

SITC is seeking eligibility to act as an "affected state" under CAA § 505(a)(2), and to act in the same manner as a state under CAA § 110. SITC has an Air Quality Program as part of its Planning Department. The Air Quality Program primarily focuses on monitoring air quality, and also has worked on a variety of air related projects including Indoor Air Quality and Woodstove changeouts. It has operated two outdoor air quality monitoring stations for more than five years, monitoring both air quality and meteorological conditions. SITC has also regulated open burning on the Reservation through its inherent authority, in a manner similar to that provided in the Federal Implementation Plan under Federal Air Rules for Reservations. The Air Quality Program

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<sup>1</sup> Under CAA § 505(a)(2), states whose air quality may be affected and that are contiguous to the state in which the emissions from a major source originate and states that are within fifty miles of the source are afforded notice and an opportunity to submit written recommendations respecting the issuance of the permit and its terms and conditions. Although the permitting authority must explain any failure to accept such recommendations, there is no requirement that the permitting authority modify its action in response to comments from an affected state. Thus, the function of affected state status under CAA § 505(a)(2) entails no exercise of regulatory authority under the CAA.

is funded in part by the EPA through a CAA § 105 grant which provides partial FTE for two employees.

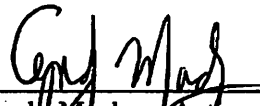
SITC also administers related or similar programs pertaining to water quality, public health, and noxious weed control, and has participated in several hazardous waste sites on the Reservation.

Based on the EPA's experience administering grants to SITC and working with SITC on various regulatory programs, as well as information in SITC's TAS Application, EPA concludes that SITC is capable of administering § 110 and § 505(a)(2) of the CAA in the same manner as a state.


The application meets the requirements of 40 C.F.R. § 49.7(a)(4), and SITC meets the requirement of 40 C.F.R. § 49.6(d).

### **RECOMMENDATION**

Based on the analysis set forth above, ORC and OAWT conclude that SITC's TAS application meets the requirements of 40 CFR § 49.7, and recommends that the Regional Administrator determine that SITC meets the requirements of CAA § 301(d) and 40 CFR § 49.6, and is therefore eligible to be treated in the same manner as a state for two purposes: (1) having "affected state" status under CAA § 502(a)(2); and (2) implementing a Tribal Implementation Plan (TIP) for open burning under CAA § 110.

  
\_\_\_\_\_  
Cyndy Mackey, Acting Regional Counsel  
Office of Regional Counsel

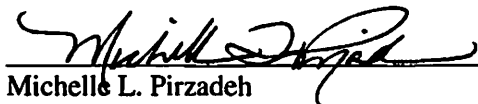
Dated: 2/11/10

  
\_\_\_\_\_  
For Richard Albright, Director  
Office of Air, Waste, and Toxics

Dated: 2/12/10

### **DETERMINATION**

Based on the information provided to me by The Swinomish Indian Tribal Community, and the above Eligibility Review and Recommendation from the EPA Region 10 Office of Air, Waste and Toxics and Office of Regional Counsel, I have determined that the Swinomish Indian Tribal Community meets the requirements of Section 301(d) of the Clean Air Act, and 40 CFR § 49.6, for two purposes: (1) having "affected state" status under Section 505(a)(2) of the Clean Air Act, and (2) implementing a Tribal Implementation Plan for open burning under Section 110 of the Clean Air Act.



Michelle L. Pirzadeh  
Acting Regional Administrator

Dated: 2/10/10

Silver, M

	Cohon, K	Spenillo, J	Islam, M	Allnutt, D	
Initial	KSC	M	M.I	MBS	
Date	2/3/10	2/3/10	2/12/10	2/11/10	



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 10**  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101-3140

FEB 03 2010

OFFICE OF  
AIR, WASTE, AND TOXICS

**MEMORANDUM**

**SUBJECT:** Treatment in the Same Manner as a State (TAS) for the Swinomish Indian Tribal Community

**FROM:** Justin A Spenillo, Project Officer *[Signature]* 2.3.10  
Office of Air Waste and Toxics

**TO:** Keith Cohon, Assistant Regional Counsel  
Office of Regional Counsel

This memo provides my evaluation of the capability of the Swinomish Indian Tribal Community (SITC) to administer a Tribal Implementation Plan under Section 110 of the Clean Air Act (CAA) for the purpose of regulating open burning, and to act as an "Affected State" under CAA § 505(a)(2). Evaluations are based on my 1.5 year experience working as project officer on a CAA § 105 grant with SITC, and my review of SITC's Application for TAS under CAA § 301(d) for purposes of CAA §§ 110 and 505(a)(2).

SITC has the capability to administer an air pollution and control program. The Tribe has administered an air quality program, under CAA § 103 and CAA § 105 grants, for over 10 years. SITC has developed an air quality program, including an air quality specialist and a technician, capable of monitoring air quality, analyzing resulting data, and working on a variety of air quality projects.

Over the recent years, SITC has worked with EPA R10 staff to develop a Tribal Implementation Plan (TIP) for Open Burning. They currently are in the process of getting Tribal approval of the TIP, which the Tribe informs us can move forward once SITC's CAA § 110 TAS application is approved. Once the TIP is approved, the workplan under SITC's CAA § 105 grant will provide details for implementing the TIP using current staff.

As a Tribe living near a number of significant sources of air pollution, the SITC has also applied for TAS for status as an "affected state" for purposes of CAA § 505(a)(2), which would allow the Tribe to comment on permits for these nearby sources with a level of recognition higher than that of public comments. Under the current SITC workplan, a SITC air quality program employee has funding and tasks to complete training that will provide education on how to make comments on such permits as an affected state.

Based on review of the application dated January 14, 2009, and knowledge of SITC, I believe that the Tribe is capable of administering a Tribal Implementation Plan under CAA § 110, and acting as an "Affected State" under CAA § 505(a)(2).



## **DOCKET**

1/6/2009      TAS Application Package

1/14/2009      TAS Application Correction/Clarification Letter

2/12/2009      Letter from M. Pirzadeh (EPA) to M. Cladoosby (Tribe) re receipt of complete TAS application.

2/12/2009      Letter from M. Pirzadeh (EPA) to C. Gregoire (State of Washington) re notice of and opportunity to comment on TAS application

2/19/2009      Public Voucher for Advertising, Proof – Skagit Valley Herald

2/19/2009      Public Voucher for Advertising, Proof – The Seattle Times

3/20/2009      Letter from P. Zehm (WDOE) to J. Spenillo (EPA) re State comments on TAS application

2/03/2010      Capability Memo from J. Spenillo (EPA) to K. Cohon re capability of Swinomish Air Quality Program

Received  
MAY 19 2010  
Office Of Air, Waste  
And Toxics

## **MEMORANDUM OF AGREEMENT**

### **Between the Swinomish Indian Tribal Community and the U.S. Environmental Protection Agency Region 10 Regarding Criminal Enforcement of Certain Sections of the Clean Air Act on the Swinomish Reservation**

**WHEREAS** the U.S. Environmental Protection Agency (EPA), pursuant to Section 301(d) of the Clean Air Act, 42 U.S.C. § 7601(d), and 40 C.F.R. Part 49 is authorized to treat Indian tribes in the same manner as states for the purpose of administering certain provisions of the Clean Air Act;

**WHEREAS** the Swinomish Indian Tribal Community (SITC) has applied to EPA for treatment in the same manner as a state (TAS) for the purpose of administering a Clean Air Act tribal implementation plan (TIP) within the exterior boundaries of the Swinomish Indian Reservation;

**WHEREAS** the criminal enforcement authority of SITC is limited by the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(7), and by other federal law; and

**WHEREAS** federal regulations at 40 C.F.R §§ 49.7(a)(6) and 49.8 allow approval of tribal TAS applications for Clean Air Act programs that include criminal enforcement components where an eligible Indian tribe seeking TAS enters into a Memorandum of Agreement (MOA) with the appropriate EPA regional office, setting forth a procedure by which the tribe will provide potential investigative leads to the federal government in an appropriate and timely manner under circumstances in which the tribe is precluded from asserting criminal enforcement authority;

**NOW THEREFORE** the parties agree as follows:

#### **ARTICLE I. Applicability**

- A. SITC will provide investigative leads in accordance with Article II when SITC has reason to suspect that:
  - 1. A non-Native American has committed an act or omission within the exterior boundaries of the Swinomish Reservation potentially punishable by a criminal penalty, as provided by Section 113(c) of the Clean Air Act, 42 U.S.C. § 7413(c); or
  - 2. A Native American has committed an act or omission within the exterior boundaries of the Swinomish Reservation potentially punishable by a criminal penalty resulting in a fine greater than \$5,000, a term of imprisonment greater than one year, or both, as provided by Section 113(c) of the Clean Air Act, 42 U.S.C. § 7413(c).
- B. This MOA will not be construed to limit or otherwise alter the criminal enforcement jurisdiction of EPA or SITC under applicable federal law.

## **ARTICLE II. Procedure By Which SITC Will Notify the Federal Government and Submit Investigative Leads**

- A. Whenever SITC has reason to suspect the circumstances described in Article I, SITC will immediately notify the EPA Criminal Investigation Division (CID) Seattle Area Office and/or the appropriate U.S. Attorney's Office by telephone or fax and provide initial investigative leads supporting such suspicion within 24 hours of becoming aware of the suspected violation.
- B. After providing the initial investigative lead, SITC will, when requested, continue to assist CID in collecting additional evidence to support the investigation, and will make available inspectors or other employees of SITC who witnessed the suspected violations or who are otherwise in the chain of custody for evidence of the violation.

## **ARTICLE III. Liaisons and Communications**

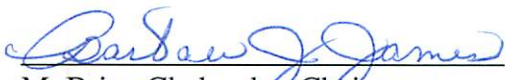
- A. The following individuals will fulfill the roles and responsibilities of this MOA:
  - 1. For SITC, the Environmental Management Coordinator of the Swinomish Office of Planning and Community Development or the Chief of Police of the Swinomish Police Department; and
  - 2. For EPA Region 10, the CID Seattle Area Office Special Agent in Charge.
- B. All communication between SITC and EPA or other representatives of the United States concerning investigations or enforcement matters covered by this MOA ("Covered Information") will be treated as confidential information and information compiled for law enforcement purposes not subject to disclosure under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, to the extent permitted by law. The parties shall take steps to preserve the confidentiality of Covered Information and, to the extent permitted by law, will not disclose Covered Information to anyone outside the Federal or Tribal governments without the consent of both parties except as part of an enforcement proceeding. If the Tribe is unable to protect Covered Information from disclosure, it shall notify EPA Region 10 before EPA shares any Covered Information with the Tribe. If the EPA or any other representative of the United States is unable to protect Covered Information from disclosure, including but not limited to disclosure under the Freedom of Information Act, it shall notify the SITC Office of Tribal Attorney at least 10 working days prior to disclosure.

## **ARTICLE IV. Limitations**


- A. This MOA defines in general terms the basis on which the parties intend to cooperate. Any provision in it is void to the extent that it conflicts with or is

inconsistent with applicable law, federal regulations, or federal policy. This MOA is neither a fiscal nor a funds obligation document. Nothing in this MOA obligates EPA to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations. The MOA does not exempt transactions between EPA and SITC from EPA policies governing competition for assistance agreements and contracts. Any obligation or expenditure of funds by EPA in furtherance of the goals of this MOA must be consistent with existing legal authorities. All obligations and expenditures of funds by EPA will be subject to the availability of appropriations and EPA's discretion in making budgetary determinations. Nothing in this MOA may be construed to give rise to a claim for compensation for services performed to further the goals of this agreement.

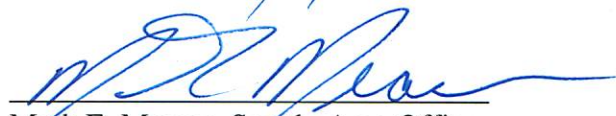
- B. This MOA does not create any right or benefit, substantive or procedural, enforceable by law or equity by a third party against SITC or EPA, their officers or employees, or any other person. This MOA does not direct or apply to any person other than SITC and EPA.
- C. This MOA will become effective on the date of the last signature. It may be modified or amended only through the written agreement of both parties. This MOA will continue in effect until terminated by the parties. Either party may terminate the MOA by providing 90 days written notice to the other party.

  
M. Brian Cladoosby, Chairman  
Swinomish Indian Tribal Community  
*Barbara James, Vice-Chair*

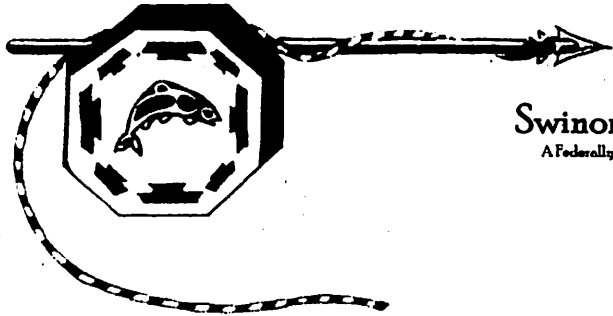
Dated: 5-11-10

  
Edward J. Kowalski, Director  
Office of Compliance and Enforcement  
U.S. Environmental Protection Agency, Reg. 10

Dated: 2/23/10

  
Mark E. Measer, Seattle Area Office  
Special Agent in Charge, Seattle Area  
U.S. EPA Criminal Investigation Division

Dated: 02-24-10



Phone: 360/466-3163  
Fax: 360/466-5309

**Swinomish Indian Tribal Community**  
A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476  
11404 Moorage Way  
La Conner, WA 98257

January 6, 2009

**Received**  
JAN 08 2009  
Office Of Air, Waste  
And Toxics

Ms. Diana Boquist  
Tribal Air Program Specialist  
Office of Air Quality (OAQ-107)  
U.S. EPA Region 10  
1200 6<sup>th</sup> Street  
Seattle, Washington 98101

Dear Ms. Boquist:

We are pleased to present our preliminary application for treatment as a state ("TAS") under Sections 505(a)(2) and 110 of the Clean Air Act. The application is drafted in accordance with the "Tribal Authority Rule" published at 40 CFR Part 49.

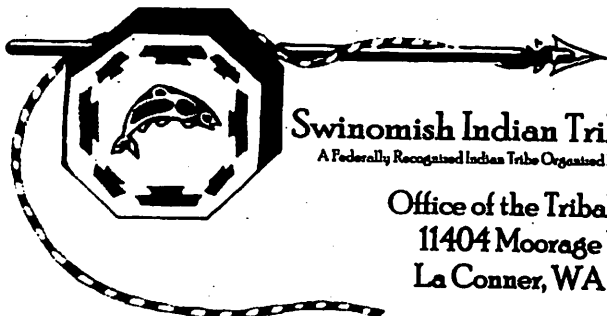
Since we have already received TAS status under various sections of the Clean Air Act and Clean Water Act, we have not developed our preliminary application in great detail. Please do not hesitate to call if you have any questions or if you would like additional information. We look forward to hearing from you.

Sincerely,

M. Brian Cladoosby  
Chairman

Enclosure

cc: Rich McAllister



**Swinomish Indian Tribal Community**  
A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476

Office of the Tribal Attorney  
11404 Moorage Way  
La Conner, WA 98257

Phone: 360/466-3163  
Fax: 360/466-5309

Office of Tribal Attorney  
Alix Foster, Director  
Emily R. Hutchinson, Tribal Attorney  
James M. Jannetta, Tribal Attorney  
Jamie N. Jones, Tribal Attorney  
Stephen T. LeCuyer, Tribal Attorney

January 14, 2009

Ms. Diana Boquist  
Tribal Air Program Specialist Office of Air Quality (OAQ-107)  
U.S. EPA Region 10  
1200 Sixth Street  
Seattle, Washington 98101

**Received**  
**JAN 20 2009**  
Office Of Air, Waste  
And Toxics

Re: Swinomish Application for TAS under Sections 505(a)(2) and 110 of the Clean Air Act

Dear Ms. Boquist:

It has come to my attention that the January 6, 2009 cover letter to the Tribe's application for treatment as a state under Sections 505(a)(2) and 110 of the Clean Air Act misleadingly describes the application as "preliminary." The application submitted that date is final, and we request that the EPA treat it as such. Our use of the word preliminary was only intended to reflect that the Tribe is happy to supplement its application should the EPA require additional information from the Tribe.

Thank you for your attention to this matter, and please do not hesitate to contact me directly should additional questions arise.

Sincerely,

Emily Hutchinson  
Tribal Attorney

Cc: Rich McAllister

**Application of the Swinomish Indian Tribal Community  
for TAS Status under the Clean Air Act Sections 505(a)(2) (Affected  
State) and 110 (Tribal Implementation Plan - Open Burning)**

**I. Introduction.**

The Swinomish Indian Tribal Community ("SITC" or "Tribe") hereby applies for treatment as a state ("TAS") for purposes of "affected state" status under Section 505(a)(2) and to implement a Tribal Implementation Plan ("TIP") for open burning under Section 110 of the Air Pollution Control Act ("Clean Air Act" or "CAA"), 42 U.S.C. § 7401 *et seq.*, respectively codified at 42 U.S.C. § 7661d and § 7410. This application is divided into four parts: Part II explains that the Tribe has previously received TAS status for certain programs under the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. § 1251 *et seq.*, and the CAA; Part III explains the Clean Air Act's requirements for granting TAS to an Indian tribe; and Part IV explains the Tribe's eligibility to receive TAS status.

**II. The Tribe Has Previously Received TAS Status.**

The U.S. Environmental Protection Agency ("EPA") previously approved the Tribe's applications for TAS to administer or participate in four different water quality programs under the CWA and a Clean Air Act program. In 1989, EPA approved the Tribe's TAS application to administer a water quality program under Section 106 of the Clean Water Act, 33 U.S.C. § 1256. In 2001, EPA approved the Tribe's TAS application to administer a non-point source water quality program under Section 319 of the CWA, 33 U.S.C. § 1329. In 2004, EPA approved the Tribe's TAS application under Section 105 of

the CAA, 42 U.S.C. § 7405, and the Tribe became eligible to receive Air Quality Program grants. In 2008, EPA approved the Tribe's TAS application to administer a water quality standards program and certify that discharges comply with applicable water quality standards pursuant to Sections 303(c) and 401 of the CWA, respectively codified at 33 U.S.C. § 1313(c) and § 1341.

When a Tribe has previously received authorization for "a Clean Air Act program or for any other EPA-administered program, the applicant need only identify the prior authorization and provide the required information which has not been submitted in the previous application." 40 C.F.R. § 49.7(8). Therefore, this TAS application need not contain information submitted in support of the Tribe's previous TAS applications. Nonetheless, for ease of review, the Tribe demonstrates below that it meets each of the four criteria for TAS pursuant to Section 301 of the CAA, 42 U.S.C. § 7601.

### **III. The Clean Air Act Authorizes Treatment as a State Status for Indian Tribes.**

Section 301 of the Clean Air Act authorizes the Administrator of EPA to "treat Indian Tribes as States" and "provide such Tribe grant and contract assistance." 42 U.S.C. § 7601(d)(1).<sup>1</sup> While tribes are eligible for TAS with respect to most provisions of the CAA, Federal regulations issued under the CAA list certain provisions under which a tribe may not be treated as a state. 40 C.F.R. § 49.4. SITC does not seek TAS to operate any program or engage in any activity that may be in conflict with any of the provisions of 40 C.F.R. § 49.4.

Section 301(d)(2) of the CAA establishes the threshold criteria a tribe must meet to be treated as a state. 42 U.S.C. § 7601(d)(2). These threshold criteria are explained in

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<sup>1</sup> SITC has applied for a grant pursuant to 42 U.S.C. § 7601(d)(1)(B) under separate cover.



greater detail in the Tribal Authority Rule, set forth in part at 40 C.F.R. § 49.6, which requires that:

- (a) the applicant is an Indian tribe recognized by the Department of the Interior;
- (b) the Indian tribe has a governing body carrying out substantial governmental duties and functions;
- (c) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
- (d) the Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Air Act and all applicable regulations.

The Tribal Authority Rule also delineates the elements of a tribal application for TAS under the CAA.<sup>2</sup>

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<sup>2</sup> See 40 C.F.R. § 49.7. The elements are: (1) a statement that the applicant is an Indian tribe recognized by the Secretary of the Interior; (2) a descriptive statement demonstrating that the applicant is currently carrying out substantial governmental duties and powers over a defined area, which should describe the form of tribal government, describe the types of government functions currently performed by the tribal governing body, and identify the source of the tribal government's authority to carry out the governmental functions currently being performed; (3) a descriptive statement of the Indian tribe's authority to regulate air quality, which, if the application covers areas within the exterior boundaries of the applicant's reservation, must identify with clarity and precision the exterior boundaries of the reservation; and (4) a narrative statement describing the capability of the applicant to administer effectively any Clean Air Act program for which the tribe is seeking approval, which demonstrates the applicant's capability consistent with the applicable provisions of the Clean Air Act and implementing regulations and may include a description of the Indian tribe's previous management experience, a list of existing environmental or public health programs administered by the tribal governing body and a copy of related tribal laws, policies, and regulations, a description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government, a description of the existing, or proposed, agency of the Indian tribe that will assume primary responsibility for administering a Clean Air Act program (including a description of the relationship between the existing or proposed agency and its regulated entities), and a description of the technical and administrative capabilities of the staff to administer and manage an effective air quality program.

#### **IV. The Tribe Qualifies for TAS Status under the Tribal Authority Rule.**

As demonstrated below, SITC meets or exceeds the four criteria for treatment as a state under Section 301 of the CAA and therefore qualifies for TAS status.

**(A) The Tribe Is Recognized By the U.S. Secretary of the Interior.**

SITC is a Federally-recognized Indian tribe and appears as such on the most current list of Federally-recognized Indian Tribes. *See* 73 Fed. Reg. 18533 (2008).

**(B) The Tribe Carries Out Substantial Governmental Duties and Powers Over a Defined Area.**

**(1) *Form of Tribal Government.***

SITC is organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476. The governing law of the Tribe is a Constitution and Bylaws originally ratified by the Tribe on November 16, 1935 and approved by the U.S. Secretary of the Interior on January 27, 1936, as most recently amended and ratified by the Tribe on September 7, 1985 and approved by the U.S. Secretary of Interior on October 22, 1985. *See* Constitution and Bylaws of the Swinomish Indian Tribal Community (Attachment 1). The Constitution as amended, includes:

- (a) Tribal name and legal territory;
- (b) Tribal membership requirements;
- (c) Governing body membership, organization, and powers;
- (d) Bill of rights including voting, equal opportunity, freedom of expression, and legal due process;
- (e) Tribal land ownership and leasing; and
- (f) Constitution and By-Law amendment process.

SITC has a republican form of government. Power is vested in the General Council, which consists of all members of the Tribe eligible to vote under Tribal law. The General Council meets once a year during March.

Article III, Section 1 of the Swinomish Constitution designates the Swinomish Indian Senate as the governing body of the Tribe. The Swinomish Indian Senate consists of eleven members who are elected by the General Council to serve staggered five year terms. Members of the Swinomish Indian Senate are nominated for election by a petition signed by at least five legal voters. General elections for those Senate seats that have expired are held in March of each year during the General Council meeting. Organized according to the parliamentary model, the Senate elects by majority vote a Chairperson and other officers from its own number. A more detailed description of the election and organization of the Swinomish Indian Senate is contained in Articles IV and V of the Swinomish Constitution and Articles I through V of the Swinomish Bylaws.

## *(2) Tribal Exercise of Substantial Governmental Functions and Duties.*

The Senate carries out the executive and legislative functions of government through the exercise of powers set forth in Article VI of the Swinomish Constitution and discussed more fully below. The Senate may appoint committees, delegate powers and duties to them, and require them to report to the Senate. A report of the past year's accomplishments and upcoming year's plan are reported to the Council by the Senate at the General Council meeting each year.

Judicial functions are concentrated in the Swinomish Tribal court system. The Swinomish Tribal Court is a trial court which employs a judge/court administrator, a prosecutor, a tribal advocate, and a clerk of the court. The Swinomish Court of Appeals

hears appeals from the Swinomish Tribal Court. Its judges are appointed through the Northwest Intertribal Court System.

Specific examples of the governmental functions and duties SITC performs include law enforcement functions, functions related to health, education, and welfare, and functions related to zoning and environmental protection. To carry out these functions, the SITC employs over one hundred individuals, including police officers, medical professionals, managers, scientists, and all other personnel necessary to carry out the duties of a sovereign Indian nation.

In terms of law enforcement and social services, SITC employs ten police officers, a probation officer, and a number of social workers who provide services that are often court-ordered, such as alcohol and drug treatment and domestic violence counseling. SITC has a contractual arrangement to utilize the Skagit County jail and the jail of the Yakama Indian Nation for incarceration of persons convicted of crimes.

In terms of health, education, and welfare, SITC employs a doctor, a dentist, three nurse practitioners, and about a dozen associated employees. It provides various social services, in addition to the ones previously mentioned, including mental health and drug and alcohol counseling for Tribal members. SITC has a daycare program and a "Birth to Six" program. It also works extensively with nearby schools to help meet the unique needs of Tribal youth. SITC runs a satellite branch of the Northwest Indian College and has established another program designed to help Tribal members earn their GEDs.

SITC maintains housing for the majority of Tribal members. It also provides water service and sewage disposal for Tribal members and non-members who live in the more densely populated locations on the Reservation.

The Swinomish Office of Planning and Community Development ("Planning Department") administers a zoning code, issues building permits and inspects new construction, administers environmental regulations including a Shorelines and Sensitive Areas ordinance, and issues Land Clearing, Storm Water and Burn permits.

The Swinomish Fisheries Department and the Skagit River System Cooperative (a cooperative venture with another Indian tribe) employ nearly two dozen individuals, including biologists, managers, and administrative staff to manage the Tribe's fishing and hunting resources and to conduct scientific research and monitoring regarding fisheries and habitat restoration.

In terms of taxation and eminent domain, SITC levies taxes upon various economic activities subject to tribal jurisdiction. Those taxes include the Utility Business Activity Tax, Retail Food and Beverage Tax, Tobacco Tax, TERO Tax, and Fish Tax. SITC reserves the right to exercise its inherent power of eminent domain.

Each year, the Senate prepares an Annual Report that explains in greater detail the governmental functions performed by each of the Tribe's Departments. *See 2007 Annual Report (Attachment 2).*

*(3) The Tribe's Power to Perform Governmental Functions Is Supported by its Constitution and the Treaty of Point Elliott.*

Various sources of law recognize and reaffirm the Tribe's inherent sovereign authority to perform governmental functions and duties. The Treaty with the Dwamish, Suquamish, Etc., 1855, 12 Stat. 927, was signed January 27, 1855, ratified by the U.S. Congress on March 8, 1859, and proclaimed by the U. S. President April 11, 1859. Now known as the "Treaty of Point Elliott," this treaty designated the Swinomish Indian

Reservation for the Tribe's use and occupation. Additionally, it confirmed the Tribe's fishing, hunting, and gathering rights. *See Treaty of Point Elliott (Attachment 3).*

The enumerated powers of the Swinomish Indian Senate are set forth in Art. VI, Sec. 1 of the Swinomish Constitution. These powers include, but are not limited to, the power to:

- (a) Negotiate with Federal, State and local governments;
- (b) Impose taxes and license fees upon members of the Community and upon non-members doing business within the Reservation;
- (c) Promulgate and enforce ordinances governing the conduct of all persons within the Reservation providing for the maintenance of law and order and the administration of justice by establishing a Tribal Court system;
- (d) Safeguard and promote the peace, safety, and general welfare of the Reservation by regulating the conduct of trade and use and disposition of property within the Reservation;
- (e) Cultivate and preserve native culture and Indian ceremonials;
- (f) Adopt resolutions regulating procedure of the Senate, and of other Tribal agencies and Tribal officials; and
- (g) Delegate to subordinate boards any of the enumerated powers reserving the right to review any action taken thereunder.

Additional Senate authority is found under its Future, Reserved, and Additional Powers, Article VI, Sections 3, 4 and 5 of the Swinomish Constitution, respectively. These sections empower the Tribe to:

- (a) Exercise powers delegated by the Secretary of the Interior or authorized agency of the government;
- (b) Exercise the rights and powers vested in the tribes or bands of the Swinomish Indian Reservation, but not referred to in the Constitution; and
- (c) Regulate all land uses within the Reservation.

(C) The Tribe Has Authority to Regulate Air Quality on the Reservation.

(1) *The Regulatory Boundaries of the Swinomish Indian Reservation.*

The Swinomish Indian Reservation consists of all lands and waters within the exterior boundaries of the Reservation, including without limitation tidelands lying landward of the line of extreme low water. *See State v. Edwards*, 188 Wash. 467, 470-72, 62 P.2d 1094 (1936)(holding that the Reservation boundaries extend to line of extreme low water); *Corrigan v. Brown*, 169 F. 477, 480-81 (C.C.W.D.Wash. 1907); Memorandum from the Department of the Interior, Office of the Regional Solicitor, Portland, Regarding Ownership of Tidelands Fronting Indian Reservations (June 20, 1962)(Attachment 4).

In its Findings of Fact on the Tribe's application for TAS to administer a water quality standards program and certify that discharges comply with applicable water quality standards pursuant to Section 303(c) and 401 of the CWA, EPA made the following findings with respect to the boundary of the Swinomish Indian Reservation:

"The Reservation consists of all the uplands and submerged lands (lands that are permanently or periodically covered by water) within the exterior boundaries of the Reservation. These lands and adjacent water bodies are generally depicted in the map entitled "General Waterbodies on and around the Swinomish Indian Reservation", which is included as Exhibit 7 to the initial Application. For purposes of the TAS Application, the Reservation includes the Swinomish Channel to the historical midpoint of the Swinomish Slough and extends to the extreme low water mark of the south, west, and north sides of the reservation, which border

waterways. *State v. Edwards*, 188 Wash. 467, 470-72, 62 P.2d 1094 (1936).

These exterior boundaries of the Reservation were established by the Treaty of Point Elliot [sic]. The Treaty Reservation is described as that part of Fidalgo Island east of a line running from Fidalgo Bay due south to Similk Bay. This boundary line corresponds to a marshy intertidal area that connected Fidalgo and Similk Bays at the time the Treaty was signed. Early maps also depict what is now McGlinn Island as a peninsula on the southeast end of Fidalgo Island, rather than as a separate island, and show that the main body of the Swinomish Slough was to the east of McGlinn Island and the causeway that now connects McGlinn Island to the Town of LaConner on the east side of the present-day Swinomish Channel. See Maps and Charts, attached as Exhibits 4 through 10 to the Second Supplemental Submission.

Subsequently, in 1873, President Grant diminished the boundaries of the Reservation by Executive Order on September 9, 1873. See Executive Order, attached as Exhibit 6 to the initial Application. The Executive Order moved the northern boundary of the Reservation east so as to exclude the peninsula of land now known as March's Point from within the exterior boundaries of the Reservation.

The Second Supplemental Submission describes how in the 1890s, the United States Army Corps of Engineers began surveying, dredging, diking, and straightening the Swinomish Slough to provide navigable access between Skagit and Padilla Bays at low tide. The Corps cut through lands at the north and south ends of the Slough, isolating on the eastern side of the present-day Swinomish Channel the two oxbows of land at the north end of the Swinomish Channel in Sections 12 and 13, T. 34N R. 2E WM and McGlinn Island and a majority of the present-day causeway connecting McGlinn Island to the Town of LaConner. Although the oxbows of land at the north end of the Swinomish Channel have now passed out of Indian ownership, the lands were repeatedly surveyed as part of the Reservation, were allotted to Indians in 1885 or 1897, were recognized by the Corps to be Reservation lands prior to the cutting that isolated them from the Reservation, and are therefore within the Reservation boundaries. See Exhibits 20 through 26 to the Second Supplemental Submissions. Recently, SITC purchased property interests in McGlinn Island and the majority of the causeway connecting it to the Town of LaConner with funds from a federal appropriation. The Tribe has provided copies of the deeds and Bureau of Indian Affairs documents which show that those lands are held in trust for the Tribe, as well as correspondence from the Washington State Department of Natural Resources and the Skagit County Board of Commissioners recognizing



those lands to be within the Reservation boundary. *See* Exhibits 12 through 19 to the Second Supplemental Submissions.

The boundaries of the Reservation extend at least as far as the historical midpoint of the Swinomish Slough (Slough) [n. 1] to the extreme low water mark of the southern and western waters surrounding the Reservation, to a line that trends east from the extreme low water mark of Turners Bay, then north to the extreme low water mark of Padilla Bay. The Regulatory Boundaries Map, attached as Exhibit 7 to the Initial Application, provides a good general representation of the historical midpoint of the Slough and the extreme low water mark on the southern, western, and northern sides of the Reservation based on survey, photographic, and historical data from a variety of sources the Tribe has gathered. However, the actual Reservation boundaries may differ from those depicted in the Regulatory Boundaries Map because the extreme low water mark is not permanently fixed. The Reservation boundaries shown in the maps enclosed as Exhibit 7 to the Initial Application and other maps submitted by the Tribe in support of the Application comprise the area over which the Tribe is asserting authority to establish CWA water quality standards under CWA Section 303(c), 33 U.S.C. § 1313(c), and CWA Section 401, 33 U.S.C. § 1341.

[n. 1] Although the Tribe believes that the Reservation boundaries extend farther than those described herein, it is asserting regulatory authority, for TAS purposes, only to the historical midpoint of the Slough. ”

*See* Swinomish Indian Tribal Community Findings of Fact at 3-4 (2008)(Attachment 5).

At a minimum, and as found by the EPA, the boundaries of the Reservation extend at least as far as the historical midpoint of the Swinomish Slough to the extreme low water mark of the southern and western waters surrounding the Reservation, to a line that trends east from the extreme low water mark of Turners Bay, then north to the extreme low water mark of Padilla Bay. *See* Regulatory Boundary Map (Attachment 6). It is lands, including without limitation tidelands, and waters within these boundaries over which the Tribe asserts authority for purposes of this TAS application.<sup>3</sup>

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<sup>3</sup> The boundaries described in this section are for regulatory purposes only. The Tribe reserves the right to argue outside of the context of this TAS application that the actual reservation boundaries extend farther than those described herein.

**(2) *The Tribe's Authority to Regulate Air Quality Derives from its Inherent Sovereign Authority and Congressional Delegation.***

Various sources of law recognize and reaffirm the Tribe's authority to regulate the quality of the Reservation environment, including without limitation air quality within the Reservation boundaries. Congress amended the CAA in 1990 to include the treatment as a state provision now codified in Section 301. EPA has interpreted this provision to be "a delegation of federal authority, to tribes approved by EPA to administer CAA programs in the same manner as states, over all air resources within the exterior boundaries of a reservation for such programs," such that a tribe need not demonstrate jurisdiction (including without limitation jurisdiction derived from the Tribe's inherent sovereign authority) over all lands within the reservation. *See* 63 Fed. Reg. 7254-55 (Feb. 12, 1998). Federal courts have upheld the validity of this interpretation. *See, e.g., Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1288-92 (D.C. Cir. 2000), *cert. denied*, *Michigan v. EPA*, 532 U.S. 970 (2001). Therefore, if the Tribe's TAS application is approved, the Tribe has authority to regulate air quality within the Reservation pursuant to Congressional delegation of Federal authority.

SITC also has inherent sovereign authority to regulate the quality of the Reservation environment, including without limitation Reservation air quality. Federally-recognized Indian tribes retain the right to regulate both members and non-members within their reservations to the extent of their inherent sovereign authority. *See, e.g., Washington v. Confederated Tribes*, 447 U.S. 134, 152-154 (1980); *see also Montana v. United States*, 590 U.S. 544, 565-566 (1981).

The Swinomish Tribe's preexisting inherent sovereign authority to regulate environmental matters, including air quality, was recognized and affirmed in the Treaty of

Point Elliott. See, e.g., *U.S. v. Winans*, 198 U.S. 371, 381 (1905)(a “treaty [is] not a grant of rights to the Indians, but a grant of right from them, - a reservation of those not granted”); *Worcester v. Georgia*, 31 U.S. (Pet.) 515, 559 (1832) (recognizing that “[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed possessors of the soil, from time immemorial”). The Tribe’s authority to regulate air quality is a necessary outgrowth of several Treaty provisions.

First, the right to regulate air quality is inherent in the provision setting aside the reservation for the Tribe’s exclusive use and occupation. Treaty of Point Elliott, Art. 2.

Second, the right to regulate air quality is a logical corollary of the Tribe’s right to exclude nonmembers from its reservation. *Id.* Because the Treaty recognizes and affirms that the Tribe has the sovereign right to exclude non-members from the reservation, the Tribe necessarily also has “the lesser power to regulate” air quality on the reservation “in the interest of protecting the tribal community.” *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 433 (1989)(Stevens, J., plurality opinion)(noting that the right to exclude “necessarily must include the lesser power to regulate land use in the interest of protecting the tribal community”).

Third, the Tribe’s authority to regulate air quality is also affirmed by the Treaty provision recognizing the Tribe’s fishing, hunting and gathering rights. Treaty of Point Elliott, Art. 5. The viability of reservation lands and waters for fishing, shellfish gathering, waterfowl hunting, and gathering of roots and berries all depend, to differing degrees, upon high air quality. Because these treaty rights could be impaired or even destroyed by poor air quality, the Tribe has the sovereign authority to protect them to the limits of its jurisdiction. See, e.g., *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1982)(holding that tribe

has a right to regulate on-reservation water use so as to protect its on-reservation fishery, the cultivation of which was one of the reasons for which the reservation was created); *United States v. Washington*, 384 F. Supp. 312, 403 (W.D. Wash. 1974) (holding that tribes have regulatory authority over treaty-protected fisheries).

In sum, both the CAA treatment as a state provision and several provisions of the Treaty of Point Elliott affirm and support the Tribe's authority to regulate on-Reservation air quality.

**(D) The Tribe Is Capable Of Effectively Administering the Affected State and Open Burning TIP Programs.**

The Tribe is capable of effectively administering the programs for which it seeks TAS status, as demonstrated by its experience administering an SITC air quality program with funding provided by EPA pursuant to Section 105 of the Clean Air Act and its extensive experience in administering other environmental and public health programs.

***(1) SITC Currently Administers an Effective Air Quality Program.***

SITC, through the Planning Department, currently administers an effective and efficient Air Quality Program. This program monitors air quality, conducts assessment and abatement of the indoor air quality of tribal housing stock, and performs outreach and education to the Reservation community regarding air quality issues. The Tribe has operated two air quality monitoring stations within the exterior boundaries of the Reservation for over five years. One has monitored air quality (ozone, sulfur dioxide, and nitrogen dioxide) and meteorological conditions (wind speed and direction, temperature, humidity, precipitation, barometric pressure, and solar radiation). The other station monitors the same meteorological conditions in a different location on the Reservation. Data from both stations are screened pursuant to an EPA-approved Quality

Assurance Project Plan, and then uploaded into the national Air Quality System (AQS), where it is available through the internet. This data is an essential link in the transnational air quality monitoring program administered by the Puget Sound/Georgia Basin Transboundary Committee. The air quality project has also provided historical data to the Puget Sound/Georgia Basin Transboundary Committee, which has been crucial in developing a better understanding of the airshed.

The Air Quality Program has also completed an assessment of most of the indoor air quality of Tribal housing and developed procedures to begin abating the air quality problems discovered during these assessments. These assessments and the concomitant abatement measures have led to a significant decrease in asthma triggers and a significant improvement in indoor air quality. Overall health of tribal members has improved and associated medical costs have declined. The Tribe's Air Quality Program offers training to SITC employees from programs and departments other than the Planning Department, especially the Housing and Utilities Department, and includes significant outreach and education components to Tribal members and other Reservation residents regarding air quality issues.

For several years, the Tribe has regulated open burning on the Reservation pursuant to its inherent authority through a Tribal ordinance. *See* Swinomish Tribal Code ("STC") Chapter 19-02 (Attachment 7). The ordinance includes permit requirements, compliance assistance, and enforcement provisions; identifies prohibited materials; and, when needed, authorizes the imposition of burn bans in order to reduce the adverse impacts of open burning on air quality and the health of Tribal members and Reservation residents. Burn permits are required for all open burns with a dimension over four feet on a side,

including for silvicultural and agricultural activities. The prohibited materials list is the same that listed in 40 C.F.R. § 49.131 of the Federal Air Rules for Reservations (FARR) promulgated by EPA in the Federal Implementation Plan (FIP) for the Swinomish Reservation, and burn bans are implemented for both fire safety and air quality conditions.

The Air Quality Program has for the last several years employed two full-time staff positions: an Air Quality Analyst and an Air Quality Technician. In addition, employees from the Housing and Utilities Department assist the Planning Department in administering the abatement portion of the indoor air quality project. The Air Quality Program is funded in part by the EPA under the authority of Section 105 of the Clean Air Act, 42 U.S.C. § 7405.

*(2) SITC Has Extensive Experience Managing Health and Welfare and Environmental Programs and Services.*

SITC has a long and distinguished record of administering federal and Tribal programs and obtaining federal grants to protect and improve the health and welfare of Tribal members and the quality of the Reservation environment.

The Tribe's long-range goals for the protection of natural resources are:

- (a) To ensure an environment that is compatible with the purposes for which the Reservation was created;
- (b) To promote the maximum fulfillment of traditional cultural and religious tribal values and the continuance of a heritage of balanced dependence of community members on the renewable resources of the Reservation;
- (c) To preserve, enhance, rehabilitate and utilize the natural resources and ecological, recreational and aesthetic qualities of the Reservation; and to

recognize an obligation to future generations in the comprehensive management of the natural resources; and

- (d) To further develop Tribal capability to administer and enforce protective and comprehensive management measures for Reservation resources. The Tribe will continue to balance environmental preservation and enhancement with the environmentally responsible development necessary to promote housing, employment, and economic activities.

The Swinomish Tribal public health and welfare and environmental authority, as evidenced by and through a variety of codes, ordinances, and policies (available at [www.swinomish.org/departments/tribal\\_attorney/tribal\\_code/index.html](http://www.swinomish.org/departments/tribal_attorney/tribal_code/index.html) unless otherwise noted), includes:

- (a) a public health and welfare code, STC Title 10;
- (b) a utilities code, STC Title 11;
- (c) a building and construction code, STC Title 12;
- (d) a natural resources code, STC Title 18;
- (e) a Tribal Environmental Policy Act, STC Chapter 19-01;
- (f) a Clean Air Act, STC Chapter 19-02 (Attachment 7);
- (g) a herbicides and pesticides code, STC Chapter 19-03;
- (h) a shorelines and sensitive areas code, STC Chapter 19-04;
- (i) a land clearing code, STC Chapter 19-05;
- (j) a land use and zoning code, STC Title 20; and
- (k) the Swinomish Comprehensive Land Use Plan (Attachment 8).

Collectively, these codes, ordinances, and policies establish public health and welfare and environmental programs and regulations to protect the health and general well-being of Tribal members and non-members who live or work on or visit the Reservation and to protect Reservation resources from degradation.

Pursuant to the above-described authority, SITC administers, *inter alia*, a water quality program, public health programs, an air quality program, and a noxious weed control program. The Tribal Water Resources program monitors water quality and stream flows and performs a variety of other functions related to water quality, such as assessing wetlands and conducting amphibian surveys. The Water Resources program is currently developing water quality standards under Section 303(c) of the CWA and protocols for water quality certifications pursuant to Section 401 of the CWA.

SITC administers a public health program for SITC and three other area tribes. The program is funded by the U.S. Indian Health Service, Northwest Washington Service Unit. The service unit sanitarian inspects septic systems for Tribal members who are not on the Tribal sewage system and provides instruction on sanitation and regulatory oversight for food establishments and food prepared for public gatherings.

SITC manages a noxious weed control program using integrated pest management techniques. This program includes a major effort to eradicate *Spartina*, an invasive weed in tidelands and estuarine wetlands, as well as control of other terrestrial weeds such as knotweed, knapweed, and scotsbroom through manual, mechanical, biological and chemical methods.

Additionally, the Tribe has helped clean up successfully several hazardous waste sites on the Reservation. For example, in November 2002, cleanup of the PM Northwest site



was officially completed. In the 1960s, the site had been used to store chemical waste from refineries in four disposal ponds. Fifty-eight thousand tons of hazardous material and contaminated soils were removed at a cost of over \$4 million pursuant to the EPA's administrative order on consent. See Administrative Order on Consent, EPA Docket No. CERCLA-10-2000-0186, effective December 6, 2000. SITC provided oversight for the project.

(2) *The Office of Planning and Community Development Will Administer and Manage the Affected State and Open Burning Programs.*

SITC intends to administer treatment as an "affected state" and open burning

programs through the Office of Planning and Community Development ("Planning Department"). The Planning Department currently manages the following programs:

realty, environmental management, building and permitting, land use and planning, and

water resources. Many of these programs have a science and research component. Most

of them also have a permitting component. The Environmental Management Team,

which currently includes both the environmental permitting program and the Clean Air

Act Section 105 air quality program, will administer the new air programs for open

burning and affected state under Sections 110 and 505(a)(2) of the Clean Air Act.

If the Tribe's application for TAS for Section 505(a)(2) of the CAA is approved, the

state must notify the Tribe of, and the Tribe will have the opportunity to submit

comments regarding, draft permits or permit amendments issued by the state for off-

Reservation Title V facilities within 50 miles of the Reservation.

If the Tribe's application for TAS to administer Section 110 of the CAA with respect

to open burning, all persons within the exterior boundaries of the Reservation, regardless

of Tribal membership status, will be subject to open burning regulations promulgated by the Tribe under a TIP.

***(3) The Planning Department Has the Administrative and Technical Capabilities to Administer and Manage the Affected State and Open Burning Programs.***

The Environmental Management Team administers the Air Quality Program. The Team is led by Scott Andrews, Environmental Management Coordinator. Mr. Andrews has a M.S. in Watershed Management and a law degree. His experience includes environmental or natural resource work as a research assistant, policy analyst, program coordinator and executive director for several non-profit groups and working for the Nebraska Legislature; a state wildlife agency; and for the last seven years, the Swinomish Tribe. His duties include implementation and enforcement of environmental programs in Shoreline and Sensitive Areas, Land Clearing, and Stormwater Management, as well as oversight of programs for hazardous and solid waste cleanup, emergency spill response, weed control and climate change mitigation planning. In conjunction with the Grants Administrator and program leads, he provides assistance with budget and funding issues within the Environmental Management Team. He also provides policy guidance to the Air Program and, where necessary to facilitate implementation of air regulations, assists in drafting changes to the Tribal Code.

The Air Quality Analyst has direct day-to-day oversight of the Air Quality program, and is responsible for air quality monitoring, indoor air quality assessments, technical analysis, and program coordination. If TAS status is approved, the Air Quality Analyst will also review Title V permits and administer the open burning program. Tony Basabe, the current Air Quality Analyst, has thirty years experience in the air quality field, including 10 years as a project/program manager for the Tribe and several years'

experience in permitting and monitoring open burns conducted under the Swinomish burn permit program. Mr. Basabe's credentials include the following:

- (a) Ph.D. in Air Quality Forest Effects from The University of Washington;
- (b) Publication of several articles in peer-reviewed scientific journals ;
- (c) Former adjunct professor of Environmental Sciences at Huxley College, Western Washington University;
- (d) Past member and chair of the steering committee for the EPA Tribal Air Monitoring (TAM) Center; and Member of the Georgia Basin/Puget Sound Transboundary Committee.

In addition, Mr. Basabe actively seeks out additional training and experience relating to air quality management that will prove to be useful if TAS status is approved. For example, he completed an EPA course on Title V review and is currently working with one of his professional mentors to evaluate a pre-construction PSD permit application for a new Title V facility near the Reservation.

Based on the combined education, training, and experience of the staff of the Environmental Management Team and the Air Quality Program, the Tribe is capable of effectively administering and managing the affected state and open burning TIP programs for which it seeks TAS approval.

## **V. Conclusion**

EPA should grant SITC Treatment as a State (TAS) so that the Tribe may operate as an "affected state" and manage open burning programs pursuant to Sections 505(a)(2) and 110 of the Clean Air Act, respectively. The Tribe has previously demonstrated its eligibility for TAS under other environmental provisions and programs administered by

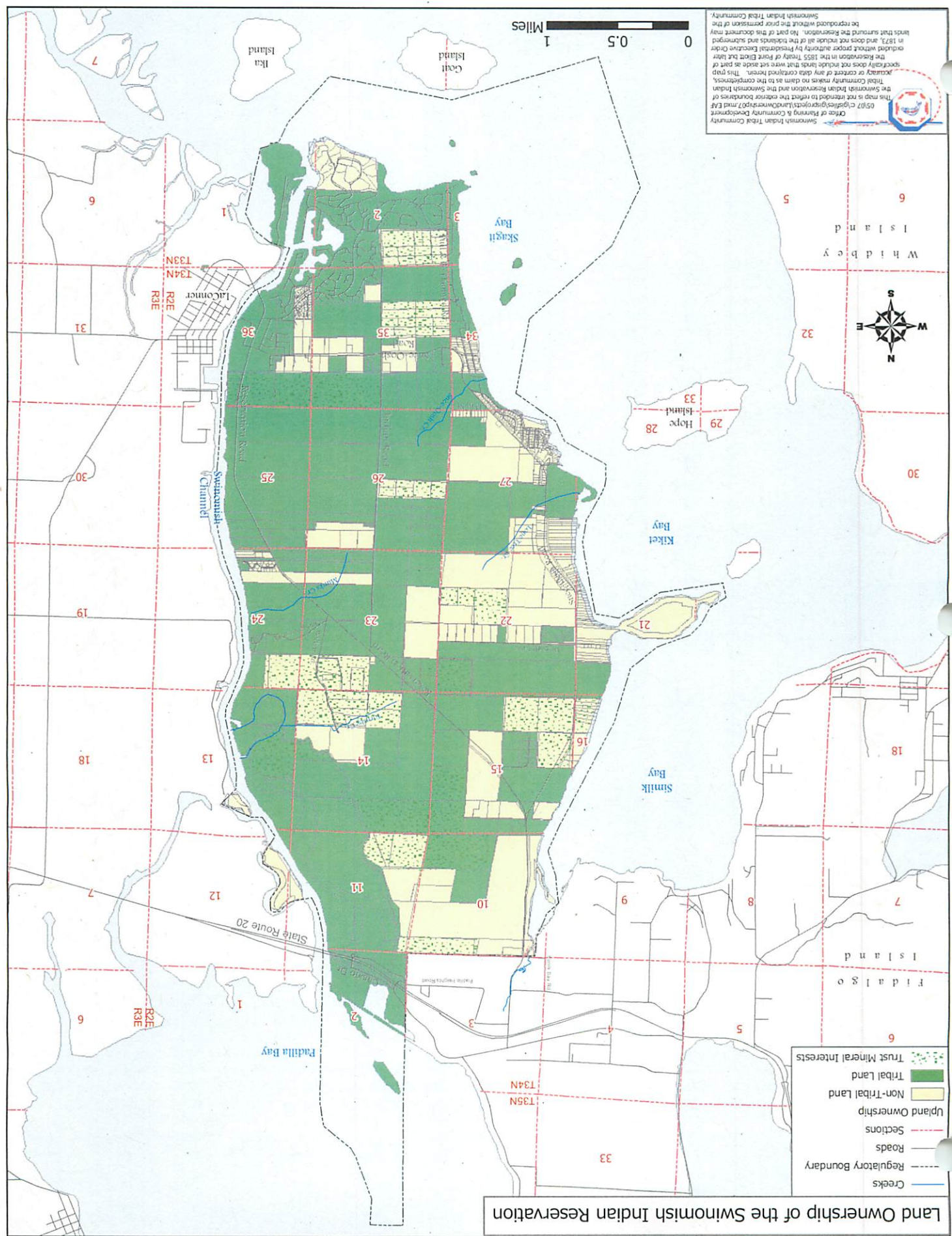
the EPA and, as set forth above, meets the eligibility requirements to exercise the Congressional delegation of authority set forth in Section 301 of the CAA. TAS approval would empower the Tribe to better manage air quality impacts from open burning within the regulatory boundaries of the Reservation and would allow the Tribe to assist EPA in protecting air quality on the Reservation from impacts of Title V sources within 50 miles of the Reservation.

# Land Ownership of the Swinomish Indian Reservation

- Creeks
- Regulatory Boundary
- Roads
- Sections
- Upland Ownership
- Non-Tribal Land
- Tribal Land
- Trust Mineral Interests

0 0.5 1 Miles

Office of Planning & Community Development  
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This map is not intended to reflect the exterior boundaries of  
the Swinomish Indian Reservation and the Swinomish Indian  
Tribal Community. It is for informational purposes only and  
should not be used as a legal document. This map was  
prepared by the Office of Planning & Community Development  
in 1973, and does not include all of the islands and submerged  
lands that surround the Reservation. No part of this document may  
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Swinomish Indian Tribal Community.





**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10**

1200 Sixth Avenue, Suite 900  
Seattle, WA 98101-3140

REGIONAL ADMINISTRATOR

February 12, 2009

The Honorable M. Brian Cladoosby  
Tribal Chairperson  
Swinomish Indian Tribal Community  
P.O. Box 817  
La Conner, WA 98257

Dear Chairperson Cladoosby:

The U.S. Environmental Protection Agency Region 10 has received your request for Treatment in the Same Manner as a State (TAS), pursuant to Section 301(d) of the Clean Air Act (CAA) and EPA regulations at 40 CFR Part 49. The application concerns the Swinomish Tribe's eligibility for TAS for purposes of being treated as an "affected state" under CAA Section 505(a)(2), and to implement a Tribal Implementation Plan ("TIP") to regulate open burning on the Swinomish Reservation under CAA Section 110. This is the Tribe's second TAS application under the CAA. On June 11, 2004 EPA approved the Tribe's TAS application for eligibility to receive a Tribal air program grant under Section 105 of the CAA.

EPA's review finds that the application is complete for purposes of further processing. Therefore, EPA is sending a letter to Christine Gregoire, Governor of the State of Washington, with copies to the Washington Department of Ecology, and to the Tribe, offering an opportunity to comment on the boundary of the Swinomish Reservation. In addition to this written notice, EPA is placing the enclosed announcement in several newspapers to notify interested parties of the opportunity to comment.

If you have any questions on this matter, please do not hesitate to contact me at (206) 553-1234, or Justin A. Spenillo, State and Tribal Air Programs Unit at (206) 553-6125.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle L. Pirzadeh".

Michelle L. Pirzadeh  
Acting Regional Administrator

Enclosure

cc: Mr. Charles O'Hara  
Planning Director  
Swinomish Indian Tribal Community